

2005

Uintah Basin Medical Center v. Leo W. Hardy, M.D. : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

UINTAH BASIN MEDICAL CENTER,

Plaintiff/Appellee,

v.

LEO W. HARDY, M.D.,

Defendant/Appellant,

LEO W. HARDY, M.D.,

Counterclaimant and
Third-Party Plaintiff,

v.

UINTAH BASIN MEDICAL CENTER and
THOMAS J. ALLRED, M.D.,

Counterclaim Defendants
and Third-Party Defendants.

**BRIEF OF APPELLANT,
LEO W. HARDY, M.D.**

Supreme Court No. 20050951

From Final Judgment and an Order of Post-Remand Summary Judgment
of the Eighth Judicial District Court for Duchesne County, State of Utah
Honorable John R. Anderson, Presiding

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JUN 20 2006

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JURISDICTION

This is an appeal from the grant of the Trial Court (Honorable John R. Anderson of the Eighth Judicial District Court in and for Duchesne County, Roosevelt Division, State of Utah the “Trial Court”) of a post-remand summary judgment and final judgment. This Court has jurisdiction to decide this appeal pursuant to UTAH CODE ANN. § 78-2-2(3)(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

(a) Did the Trial Court err when it held that Uintah Basin Medical Center (“UBMC”) had just cause to terminate Leo W. Hardy, M.D.’s (“Dr. Hardy”) (i.e. no material issue of fact existed) contract thereby taking this fact issue away from the jury?

(i) Did the Trial Court err in not allowing the jury to determine whether Dr. Hardy’s contract termination was capricious, in bad faith, or illegal?

(b) Did the Trial Court err by considering and accepting as true UBMC’s post hoc justifications for Dr. Hardy’s contract termination to explain its just cause termination of the contract?

(c) Did the Trial Court have jurisdiction to order the parties to file briefs on the remaining issue?

(d) Did the Trial Court err in treating the briefings as a motion for summary judgment when the Trial Court requested “a brief on the remaining issue”?

Standard of Review: The Trial Court’s application of the law to the undisputed facts in a motion for summary judgment is reviewed for correctness. *See Uintah Basin*

Med. Ctr. v. Hardy, 2002 UT 92, ¶ 7, 54 P.3d 1165, 1167, a copy of which is included in the Addendum as Exhibit “A” (stating that ““In deciding whether the trial court correctly granted [summary] judgment as a matter of law, we give no deference to the trial court’s view of the law; we review it for correctness.””) (citations omitted).

DETERMINATIVE LAW

The decision in this appeal is governed by common law and thus no statutes, constitutional provisions, ordinances, or rules are determinative.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceeding, and Disposition Below

This is a breach of contract case involving a professional services contract for pathology services (the “Agreement”) entered into by Dr. Hardy and UBMC.¹ The Agreement, executed on November 29, 1994, recited no termination date, but instead was terminable “for just cause.” Dr. Hardy performed under the Agreement to the complete satisfaction of all concerned, i.e. doctors, patients, medical staff, and UBMC administration. No member of the UBMC administration or medical staff ever expressed any concern whatsoever over Dr. Hardy’s performance between November of 1994 and July 1996. UBMC terminated the Agreement on July 18, 1996.

In the spring of 1996, Dr. Thomas J. Allred (“Dr. Allred”) contacted UBMC to inquire whether UBMC would be interested in hiring a full-time pathologist who was also certified as an emergency room physician. UBMC invited Dr. Allred to visit the hospital and shortly thereafter, on July 18, 1996, the UBMC Board of Trustees (the

¹ A true and correct copy of the Agreement is included in the Addendum as Exhibit “B.”

“Board”) voted to terminate Dr. Hardy’s Agreement and to offer Dr. Allred a position as director of pathology and part-time emergency room physician.

UBMC gave Dr. Hardy 90 days written notice of termination on July 29, 1996, and simply thanked him for his service without giving any reason in the letter for terminating the Agreement. When Dr. Hardy stated that UBMC did not have just cause to terminate the Agreement, UBMC filed a declaratory judgment action seeking to determine the parties’ rights under the Agreement. The parties filed cross-motions for summary judgment on Dr. Hardy’s breach of contract claim, which were both denied on October 19, 1998. After the completion of discovery, the parties agreed to stipulated facts and re-filed motions for summary judgment on the legal question of whether Dr. Hardy’s “just cause” agreement was enforceable under Utah law.

The Trial Court heard oral argument on the renewed motions for summary judgment and ruled from the bench that Dr. Hardy’s “just cause” agreement was enforceable under Utah law, and the question of whether UBMC had just cause to terminate the Agreement was for a jury to decide as a question of fact.² The Trial Court then allowed the parties to file additional briefs on the issue of whether successor UBMC boards could be bound by the Agreement or whether the Agreement was voidable by a successor board. On April 6, 2000, the Trial Court ruled that the Agreement could not be enforced against UBMC’s successor boards. The Trial Court further ruled that because the eleven-member board in place when the Agreement was terminated had three new

² See Ruling of Honorable John R. Anderson dated April 6, 2000, a true and correct copy of which is included in the Addendum as Exhibit “C.”

members, it was a successor board and hence it could terminate the Agreement at any time. On that basis, the Trial Court denied Dr. Hardy's renewed motion for summary judgment and granted summary judgment in favor of UBMC.

On June 1, 2000, Dr. Hardy filed a Notice of Appeal, thereby appealing the Trial Court's order and judgment granting Plaintiff's Motion for Summary Judgment entered on May 18, 2000. On August 30, 2002, this Court issued an opinion holding that because the contract involved a proprietary function, it was enforceable against successor boards if the contract was for a reasonable duration. *See* Ex. A at ¶ 18. This Court remanded the case back to the Trial Court instructing the court to develop the record and to determine the scope of the "just cause" provision.

On February 18, 2003, UBMC filed its Post-Remand Motion for Summary Judgment, or in the Alternative, Motion to Bifurcate. On April 15, 2003, Dr. Hardy filed his Opposition to the Post-Remand Motion for Summary Judgment requesting, *inter alia*, that additional discovery be taken in order to develop the record pursuant to this Court's direction on remand. The Trial Court did not allow additional discovery and granted UBMC's Post-Remand Motion for Summary Judgment by Ruling dated June 12, 2003 (the "2003 Ruling").³ *See* R. 1624-26, in which the Trial Court held that the contract "cannot be viewed as including a reasonable duration." (R. 1625). The Trial Court also concluded that "the intended scope of the just cause clause provided limited discretion to future boards, and is unusual when comparing Dr. Hardy's contract to other contracts typically entered into by Uintah Basin Medical Center with other medical professionals,

³ A true and correct copy of the 2003 Ruling is included in the Addendum as Exhibit "D."

and as such the contract's duration was unreasonable making the contract unenforceable,

” *Id.*

The Trial Court made its decision based on no additional discovery, even though Dr. Hardy requested additional depositions and this Court ordered development of the record. Dr. Hardy did, however, submit a declaration regarding his understanding of the “just cause” provision in compliance with this Court’s opinion. *See* R. at 1540.⁴ The Trial Court dismissed Dr. Hardy’s declaration as self-serving and refused to develop the record as ordered by this Court. In addition, the Trial Court did not allow the taking of Dr. Wayne L. Stewart’s (Dr. Stewart) deposition, another physician at UBMC whose contract terms closely mirrored Dr. Hardy’s. The Trial Court simply dismissed Dr. Hardy’s Agreement as “atypical.” Notwithstanding, the Trial Court opined, without supporting evidence, that “when comparing Dr. Hardy’s contract to other medical professionals typically entered into by Utah Basin Medical Center, the vast majority of **these** contracts provide a specific duration, and a provision allowing either party to terminate the contract after giving the appropriate notice.” (R. 1624-25). Dr. Hardy was not allowed to conduct discovery in an effort to explain the reasons for the language in his Agreement. The Trial Court’s refusal to allow additional discovery is in complete **disregard** of this Court’s directive to the Trial Court to develop the record.

⁴ A true and correct copy of Dr. Hardy’s declaration is included in the Addendum as Exhibit “F.”

On July 31, 2003, Dr. Hardy, by and through his counsel, filed a Notice of Appeal from the final judgment dated July 10, 2003 of the Honorable John R. Anderson, Eighth Judicial District Court of Duchesne County, Roosevelt Division.⁵

On March 3, 2005, the Utah Court of Appeals issued an opinion reversing the Trial Court's granting of summary judgment to UBMC and remanded the case to the Trial Court "for further proceedings consistent with" its opinion. *See Uintah Basin Med. Ctr. v. Hardy*, 2005 UT App. 92, 110 P.3d 168, a copy of which is included the Addendum as Exhibit "G." The Utah Court of Appeals determined that:

[o]n appeal, we must decide whether summary judgment was proper in this case. Specifically, we must determine (a) whether the trial court properly interpreted the "just cause" provision, (b) whether the Agreement is for a reasonable duration as a matter of law, and (c) whether any questions of fact justify remand to a finder of fact.

Id. at ¶ 8. Although not presented for review by Dr. Hardy, the court began with an in-depth analysis of the meaning of the "just cause" provision in Dr. Hardy's agreement with UBMC, ultimately finding that the "just cause" provision in the Agreement is unambiguous "and is ordinarily understood to provide employers with power to terminate an employee for legitimate business reasons and in the interest of improving client services as long as the justification is not a mere pretext for a capricious, bad faith, or illegal termination." *Id.* at ¶ 17. According to the Utah Court of Appeals, the issue

⁵ A true and correct copy of the Judgment is included in the Addendum as Exhibit "F."

remains, then, whether or not UBMC had just cause to terminate the Agreement with Dr. Hardy.⁶

Without determining whether or not the Trial Court erred in not allowing additional discovery to develop UBMC's cause for terminating the Agreement, the Utah Court of Appeals remanded the case to the Trial Court "to determine whether the Board terminated Dr. Hardy for legitimate business reasons or whether the termination was capricious, in bad faith, or illegal." *Id.* at ¶ 20. Although the just cause issue was not before it, the court provided an academic analysis of what an employer must show "to prove it terminated an employee for just cause, a matter of first impression for Utah courts." *Id.* at ¶ 21. The court held that an employer need only "justify termination with an objective good faith reason supported by the facts reasonably believed to be true by the employer" thereby allowing the jury to "determine the objective reasonableness of the employer's decision" to terminate. *Id.* (citing *Towson Univ. v. Conte*, 862 A.2d 941, 950-51 (Md. 2004)).

Prior to the Trial Court's receipt of the case on remand, the Trial Court ordered that each party "prepare, and submit to the Court, a brief on the remaining issue."⁷ In

⁶ The only issues on review to the Utah Court of Appeals regarding just cause were whether the Trial Court erred in not allowing additional discovery to develop the record so the scope of the just cause provision could be fairly determined, and whether the Trial Court erred in not allowing the jury to determine whether or not UBMC had just cause to terminate the Agreement with Dr. Hardy. For that reason, Dr. Hardy was not required and did not put on all of his evidence of UBMC's lack of just cause for the termination of the Agreement.

⁷ A true and correct copy of the Trial Court's order that the parties simultaneously submit briefs on the remaining issue is included in the Addendum as Exhibit "H."

response to the Trial Court's order, Dr. Hardy filed his Memorandum Regarding the Remaining Issue of Just Cause (included in the Addendum (excluding exhibits) as Exhibit "I") asking the Trial Court for additional discovery, and to set the case for trial so that a jury can determine whether UBMC's decision to terminate the Agreement was objectively reasonable "and base[d] [] on a reasoned conclusion and facts" UBMC reasonably believed to be true at the time of termination. *See Towson*, 862 A.2d at 954.⁸

Simultaneously, in derogation of the Trial Court's order, and beyond the time for filing dispositive motions, UBMC filed a Motion for Summary Judgment instead of the requested "brief on the remaining issue." UBMC did not file a Notice to Submit for Decision on its Motion for Summary Judgment, and the Trial Court's hearing notice did not mention a hearing on a motion for summary judgment. Nonetheless, without any notice, on remand the Trial Court improperly treated the just cause issue as one for summary judgment holding, without allowing additional discovery or requesting additional evidence, that there is insufficient evidence for a jury to decide whether or not UBMC's decision to terminate the Agreement was objectively reasonable. Thus, the Trial Court summarily dismissed Dr. Hardy's claims for breach of contract without full summary judgment briefing, and more importantly, without applying the required favorable inferences in favor of the nonmoving party.⁹

⁸ In response to the Trial Court's order that the parties submit a brief on the "remaining issue," UBMC filed a Motion for Summary Judgment, a true and correct copy of which (excluding exhibits) is included in the Addendum as Exhibit "J."

⁹ *See* Ruling and Order of Honorable John R. Anderson dated September 27, 2005, a true and correct copy of which is included in the Addendum as Exhibit "K."

Dr. Hardy appeals the Trial Court's latest dismissal of his claims because the issue of whether or not UBMC's decision to terminate the Agreement for just cause was objectively reasonable is a jury issue, not one for the Trial Court to make by weighing the credibility of witnesses and evidence.¹⁰ In addition, the Trial Court did not have jurisdiction when it ordered the parties to file briefs on the remaining issue, and when it ruled on the briefs, the Trial Court did not adhere to the summary judgment standard.

Statement of Facts

1. Dr. Hardy is a board certified pathologist. (R. 189).
2. UBMC is the business name for Duchesne County Hospital, which is owned by Duchesne County and operated by UBMC's Board of Trustees. (R. 304).
3. On November 29, 1994, Dr. Hardy and UBMC entered into the Agreement in which Dr. Hardy agreed to provide professional services for UBMC as director of the hospital's pathology laboratory and to perform related duties. The language of the Agreement was taken from a contract between UBMC and Dr. Joseph J. Sanella ("Dr. Sanella") (a pathologist at UBMC who immediately preceded Dr. Hardy). Dr. Hardy modified the Agreement slightly and returned the edited Agreement to UBMC. The

¹⁰ Interestingly, the Trial Court previously held that "[w]hether Plaintiff had 'just cause to terminate the contract would be a question of fact for the jury.'" See Ex. C. UBMC also previously argued that "[i]t is properly the province of a fact-finder to resolve whether these reasons constituted 'just cause' for terminating the Agreement. Such resolution requires further factual development and, thus, the issue of the existence, or lack of, 'just cause' cannot be resolved on Dr. Hardy's motion for summary judgment." UBMC's Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment on Counterclaim dated July 10, 1998 at p. 12, a true and correct copy of which is included in the Addendum as Exhibit "L." In this regard, the Trial Court was correct, and had it not reversed course, this appeal would not have been necessary.

Agreement was then typed onto Duchesne County Hospital letterhead and signed by Bradley D. LeBaron, who was UBMC's administrator and who had authority to enter into personal service contracts on UBMC's behalf. Although the Agreement was executed on November 29, 1994, it became effective August 1, 1994, the date upon which Dr. Hardy first began providing pathology services to UBMC. (R. 185-86, 189, 546).

4. Paragraph 11 of the Agreement provides:

This agreement shall become effective August 1, 1994 and continue to bind the parties to the terms hereof until terminated after (90) days written notice for just cause of termination by either party or by mutual consent of the parties to a shorter notice period.

(R. 185-86, 546).

5. Pursuant to the terms of the Agreement, Dr. Hardy agreed to (a) be available for physician consults to interpret laboratory results; (b) visit the UBMC hospital weekly for one to two hours to recommend processes and policies to assure smooth operation of the UBMC laboratory; and (c) undertake teaching activities when new procedures were introduced. (R. 185-86).

6. The Board is the entity authorized to terminate personal services contracts. (R. 546).

7. Pursuant to the Bylaws, the Board can terminate membership on the medical staff:

for any purpose reasonably related to the delivery of quality patient care services, including but not limited to:

(a) The Hospital's ability to provide services related to a medical specialty or sub-specialty;

- (b) The Hospital's patient load;
- (c) The determination that granting Medical Staff membership is inconsistent with the mission, role and purpose of the Hospital;
- (d) The Failure of the practitioner to comply with the terms of the Hospital or Medical Staff Bylaws, rules and regulations;
- (e) Any other reason specified in these or the Medical Staff Bylaws or others not specified which are reasonably related to the delivery of quality patient care.

(R. 994).

8. On July 18, 1996, the Board voted to terminate the Agreement and to invite Dr. Allred to join UBMC's medical staff as a pathologist and as an emergency room physician. (R. 290A, 290-91, 304, 545).

9. Dr. Hardy continued working for UBMC until October 28, 1996, approximately 90 days after UBMC notified him it was terminating the Agreement. (R. 189, 545).

10. Prior to his termination, Dr. Hardy performed his obligations under the Agreement satisfactorily and received no complaints whatsoever from UBMC or its medical staff. After termination of the Agreement, on a few occasions, at the request of members of the UBMC medical staff and with the approval of the UBMC administration, Dr. Hardy performed limited pathology services for members of the UBMC medical staff in Dr. Allred's absence. (R. 189, 545).

11. Dr. Joseph J. Sanella was the pathologist who preceded Dr. Hardy and his contract had language identical to Dr. Hardy's stating that the contract would "continue

to bind the parties to the terms [] until after ninety (90) days written notice for just cause termination by either party or by mutual consent of the parties to a shorter notice period.” (R. 1538).

12. Dr. Wayne T. Stewart was a radiologist at UBMC and his contract provided for termination only “(a) for the loss of a licence [sic] to practice in the State of Utah, or; (b) for the conviction of a felony, or; (c) by the mutual consent of both parties.” (R. 1458).

13. UBMC notified Dr. Hardy that it was terminating the Agreement via letter dated July 29, 1996, a true and correct copy of which is included in the Addendum as Exhibit “M.” This termination letter did not give any reasons for termination of the Agreement, but offered “sincere appreciation” for Dr. Hardy’s service to the hospital and its patients.

14. After UBMC terminated the Agreement, Bradley LeBaron (“Mr. LeBaron”) told Dr. Hardy that he would find just cause by “look[ing] and see[ing] what other kinds of potential issues might be brought up” *See* Deposition of Bradley LeBaron, relevant cited portions of which are included in the Addendum as Exhibit “N” at p. 126.

15. At his deposition, Mr. LeBaron testified that UBMC conducted no investigation into whether or not UBMC needed an on-site pathologist before terminating Dr. Hardy’s Agreement. *See id.* at pp. 39-40.

16. UBMC contends that “[i]n July of 1996, UBMC determined that the health, welfare, and interests of the citizens of Duchesne County would be better served by terminating Dr. Hardy’s contract.” (R. 1747).

SUMMARY OF ARGUMENT

The Trial Court erred when it usurped the jury's role in determining whether or not UBMC's decision to terminate the Agreement was objectively reasonable. This is a contract case, not an employment case, and, therefore, Dr. Hardy is entitled to have a jury determine the reasonableness of UBMC's termination of the Agreement. In his counterclaim, Dr. Hardy specifically claimed that UBMC breached the Pathology Services Agreement.¹¹ The Pathology Services Agreement is just that, a services agreement, not an employment contract. Both the Utah Court of Appeals and the Trial Court have treated the Agreement as an employment contract, analogizing this matter to employment discrimination law and termination of employees for just cause. While Dr. Hardy believes that he can meet the standard set forth by the Utah Court of Appeals in the employment context, he is not willing to relinquish his contract claim, which includes a breach of the covenant of good faith and fair dealing. *See* Ex. O at ¶¶ 27-30.

A determination of objective reasonableness is one of fact for the jury in most contexts, including contract law.¹² The issue of whether or not UBMC was objectively reasonable when it terminated the Agreement is, therefore, a jury question.

¹¹ *See* Dr. Hardy's Answer, Counterclaim and Third-Party Complaint, a true and correct copy of which is included in the Addendum as Exhibit "O" at ¶¶ 23-26.

¹² *See e.g., Olympus Hills Shopping Ctr., Ltd. v. Smith's Food & Drug Ctrs., Inc.*, 889 P.2d 445 (Utah Ct. App. 1994) (stating that the "[t]est for compliance with the covenant of good faith in contract is one of reasonableness" for a jury to decide.); *see also Darrington v. Wade*, 812 P.2d 452 (Utah Ct. App. 1991) (citing that reasonableness is a question of fact for the jury in questions of foreseeability); and *Atchison, T & S.F.R. Co. v. Andrews*, 211 F.2d 264 (10th Cir. 1954) (holding that a jury determines reasonableness of damages).

Likewise, the jury's role is to determine whether UBMC's proffered reason for termination of the Agreement was pretextual. Under the mistaken impression that Dr. Hardy's Agreement created an employee-employer relationship, the Utah Court of Appeals essentially determined that the just cause provision in the Agreement required treatment similar to the burden shifting analysis in typical employment discrimination cases.¹³ In the traditional "burden shifting" analysis for wrongful employee termination, once an employer proffers a reason for the employee's discharge, the employee must raise a question of fact as to whether the proffered reason is pretextual in order to proceed to trial.¹⁴ If a question of fact is presented by the employee, then the finder of fact (a jury in this case) determines whether the employer's proffered reason for discharge of the employee was in fact pretextual. UBMC's proffered reasons for termination of the Agreement are pretextual and illusory, proving UBMC's caprice and bad faith. Dr. Hardy presented numerous examples of pretext to the Trial Court in his brief on the "remaining issue," all of which cast doubt on the purported reasons for termination proffered by UBMC. *See* Ex. I. Although these examples raise the necessary questions of fact to survive summary judgment, the Trial Court completely ignored them and failed to give the proper favorable inferences to Dr. Hardy as required at the summary judgment stage.

¹³ As already mentioned, although Dr. Hardy believes that there are distinctions between the present contract case and the typical employment case, since the Utah Court of Appeals pointed to the employment context for authority, Dr. Hardy will address the issues as outlined by the Court of Appeals.

¹⁴ *See McDonnell Douglas v. Green*, 411 U.S. 792, 802-805 (1973).

The Trial Court also erred when it treated the just cause arguments and briefs on the remaining issue as a motion for summary judgment. The Trial Court, without jurisdiction over the case,¹⁵ directed the parties to simultaneously file “a brief on the remaining issue.” *See* Ex. H. In response, Dr. Hardy briefed the “just cause” issue, providing an outline of how the issue should be treated procedurally, and providing a sketch of the factual issues that Dr. Hardy would present at trial. *See* Ex. I. Dr. Hardy also reminded UBMC and the Trial Court that both had previously stated that just cause is a question of fact for the jury. *See* Exhibits C and L. In his brief, Dr. Hardy also asked the Trial Court to allow additional discovery, specifically of Dr. Wayne Stewart whose deposition was never completed because of UBMC’s objections and instruction to him not to answer several questions at his deposition.¹⁶ Additionally, Dr. Hardy asked the Trial Court to set this case for trial since both parties, the Trial Court, and the Utah Court of Appeals believed the just cause issue to be one of fact for the jury’s determination.

In response to the Trial Court’s order that the parties simultaneously file briefs on the remaining issue, UBMC filed a Motion for Summary Judgment. *See* Ex. J. This was not in keeping with the Trial Court’s order because the parties were not asked to make

¹⁵ As of March 22, 2005, the date on which the Trial Court ordered the parties to file briefs on the remaining issue, the Trial Court did not have jurisdiction of this case as it had not been remanded to the Trial Court. The Utah Court of Appeals set the date of May 2, 2005, as the date upon which the remittitur would occur pursuant to Rules 36 and 48 of the Utah Rules of Appellate Procedure.

¹⁶ *See* September 29, 2003 letter from Blaine J. Benard to John P. Harrington wherein UBMC agreed to continue the deposition of Dr. Stewart, included in the Addendum as Exhibit “P.”

simultaneous motions for summary judgment, but to brief the “remaining issue.”¹⁷ Moreover, it was well past time for dispositive motions to be filed, and UBMC never filed a notice to submit its Motion for Summary Judgment for decision. Instead, the Trial Court set a hearing date on the “remaining issue” without mentioning a motion for summary judgment. Dr. Hardy reasonably expected the Trial Court to review the briefs on the “remaining issue” and to set a trial date at that hearing.

To the extent, however, that the Trial Court treated the briefs on the “remaining issue” as a motion for summary judgment, it is important to note that the Trial Court did not adhere to the summary judgment standard because it did not construe all facts presented and inferences arising from those facts in a light most favorable to Dr. Hardy. Furthermore, the Trial Court failed to follow the procedures associated with summary judgment motions, e.g., allowing Dr. Hardy to file a memorandum in opposition, issuing a ruling only after a Notice to Submit for Decision was filed, etc.

Finally, the Trial Court erred in granting UBMC’s Motion for Summary Judgment because whether or not UBMC breached the covenant of good faith and fair dealing inherent in every contract, including the Agreement here, is a question of fact for the jury. As a result of the Trial Court’s dismissal of Dr. Hardy’s counterclaim, he has been deprived of his right to have a jury determine whether or not UBMC breached the implied covenant of good faith and fair dealing when it terminated the Agreement under the just cause provision. This claim cannot be ignored as it was plead at the outset and

¹⁷ Interestingly, UBMC made no mention of Rule 56 at oral argument. *See* Transcript of Oral Argument included in the Addendum as Exhibit “Q.”

the covenant of good faith and fair dealing is inherent in every contractual relationship. While this is an alternative claim to Dr. Hardy's contract claim, it is part and parcel of the "remaining issue" of whether or not UBMC had just cause to terminate the Agreement.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT USURPED THE JURY'S ROLE IN DETERMINING WHETHER OR NOT UBMC'S DECISION TO TERMINATE THE AGREEMENT WAS OBJECTIVELY REASONABLE.

A. This is a Contract Case, Not an Employment Case, and, Therefore, Dr. Hardy is Entitled to Have a Jury Determine the Reasonableness of UBMC's Termination of the Agreement.

Dr. Hardy's claims against UBMC are contract claims. In his counterclaim against UBMC, Dr. Hardy specifically claimed that UBMC breached the Pathology Services Agreement. *See* Dr. Hardy's Answer, Counterclaim and Third-Party Complaint (Ex. O) at ¶¶ 23-26. The Pathology Services Agreement is just that, a services agreement, not an employment contract. Both the Utah Court of Appeals and the Trial Court have incorrectly treated the Agreement as an employment contract, analogizing this matter to employment discrimination law and just cause termination of employees. While Dr. Hardy believes that he can meet the standard set forth by the Utah Court of Appeals in the employment context, he is not willing to relinquish his contract claim, which includes a breach of the covenant of good faith and fair dealing. *See* Ex. O at ¶¶ 27-30.

Equally important is the fact that Dr. Hardy was not an employee of UBMC, but an independent contractor with a services agreement.¹⁸ It is not unusual for service-based doctors to have service agreements, instead of employment contracts with hospitals because they are specialists.¹⁹ Dr. Hardy's status as an independent contractor, combined with his claim against UBMC for breach of the Pathology Services Agreement, support his contention that this is not an employment case, but a breach of contract case.

In the employment law context, courts are careful not to allow the fact finder to put itself in the place of the decision makers because those decision makers have a greater degree of familiarity with the employee's history, they deal with the employee on a day-to-day basis, they know the subtle complexities of the situation, and they are not at arm's-length. Employers are, therefore, given more deference to make decisions regarding the hiring and firing of employees, and the jury is not allowed to second guess the employer. By contrast, the decision to terminate a contract for just cause is not

¹⁸ The difference between an employee and an independent contractor is that with an independent contractor, the company does not control how the work is done. In other words, the company does not control the method of accomplishment of the work. *See Ludlow v. Indus. Comm'n*, 235 P. 884 (Utah 1925) (citations omitted). UBMC never controlled how Dr. Hardy performed pathology services or operated his pathology laboratory. In addition, Dr. Hardy certainly meets the traditional IRS 20 factor test to be considered an independent contractor. *See* Rev. Rul. 87-41, 1987-1 C.B. 296, a true and correct copy of which is included in the Addendum as Exhibit "R." Moreover, since UBMC did not withhold employment related taxes, it did not consider him to be an employee.

¹⁹ *See e.g., Bonney Motor Express, Inc. v. U.S.*, 206 F.Supp. 22, 29 (E.D. Va. 1962) where the court noted: "Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow in independent trade, business or profession, in which they offer their services to the public, are not employees." (citation omitted).

provided the same deference or discretion because the situation deals with business transactions, not day-to-day personnel decisions. The arm's-length nature of those business transactions requires the fact finder to be more critically involved in determining the reasonableness of contract decisions and to verify that the termination decision is not fueled simply by the terminating party's desire to obtain a better deal. The focus is on one business transaction—the contract—and not on a long employment history.

UBMC, just as any party to a contract, is subject to a determination of whether or not its termination of the Agreement with Dr. Hardy was reasonable. This is a jury question, and in the contract context, UBMC's decision and purported reasons for termination should not be accorded any special deference. The Trial Court erred in this matter because it took this issue away from the jury and accorded deference to UBMC's purported reasons for termination of the Agreement.

B. UBMC Breached the Contract it Had With Dr. Hardy.

This is a contract case as evidenced by the legal position UBMC has taken over the past nine years. Throughout this litigation, UBMC has contended that because it is a county entity, UBMC must “make contractual decisions that best serve the tax-paying citizen and the community.” *See* Ex. L at p. 9. Essentially, UBMC has argued that because it is a non-profit entity serving the public, it may unilaterally terminate a contract if UBMC believes that the contract no longer serves the public interest.²⁰ This argument cannot prevail, however, because it would mean that all government entities would be

²⁰ In the first decision rendered by this Court in this matter, this Court dispelled that theory when it found that the Agreement was no different from any other business contract because it involved a proprietary function. *See* Ex. A.

able to breach a contract with impunity whenever a “better deal” came along. Courts have consistently held that governmental entities have no such right. *See e.g., Park City Educ. Ass’n v. Board of Educ. of Park City*, 879 P.2d 267, 270 (Utah Ct. App. 1994) (rejecting the theory that a governmental entity may breach a contract for policy reasons).

In *Georgia Magnetic Imaging, Inc. v. Green County Hosp. Auth.*, 466 S.E.2d 41 (Ga. Ct. App. 1995) the court rejected the very argument that UBMC has made throughout this case. The hospital in that case argued that it had “just cause” to terminate a contract because (1) “the Hospital gained financially from terminating its arrangement”; and (2) “it improved its quality of patient care” by entering into a new contract that allowed the hospital to provide 24-hour rather than part time services. *Id.* at 45. The Georgia Court of Appeals rejected the hospital’s argument stating that “. . . even in the interest of providing better patient care, the hospital authority was not justified in terminating the contracts purely because, in its judgment, the contracts proved to be financially detrimental or because it was able to strike a better deal with someone else.” *Id.*

Like the hospital in *Georgia Magnetic*, UBMC claims (albeit after-the fact) that it terminated the Agreement because the “health, welfare, and interests of the citizens of Duchesne County would be better served by terminating” the Agreement. (R. 1747). Specifically, Mr. LeBaron testified that terminating the Agreement was a better deal for UBMC because Dr. Allred would live and pay taxes in the community, the hospital would have a full-time pathologist on-site, and Dr. Allred could work in the emergency room. *See* Ex. N at pp. 39, 41, & 95. UBMC cannot, however, simply terminate Dr.

Hardy's Agreement because it believes it is getting a "better deal." *See e.g., Heiner v. S.J. Groves & Sons Co.*, 790 P.2d 107, 110 (Utah Ct. App. 1990) ("It is a long-standing rule in Utah that persons dealing at arm's length are entitled to contract on their own terms without the intervention of the courts to relieve the other party from the effects of a bad bargain.") Even if UBMC's post-hoc justifications are taken as true, these justifications do not permit UBMC to breach the Agreement without paying damages to Dr. Hardy for the breach.

Although there is an accepted contract theory that allows parties to breach a contract when the breaching party finds "it difficult or uneconomic to perform" the contract it has entered into, the breaching party is required to pay damages for the so-called "efficient breach." *See* Howard O. Hunter, CONTRACT THEORY, REMEDIAL CHOICES, AND RELATIONSHIPS, *Modern Law of Contracts* § 1:3 (2004). The origin of "efficient breach" lies in Justice Oliver Wendell Holmes, Jr.'s theory that a party can either perform under a contract or pay damages for nonperformance. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 235-36 (Mark DeWolfe Howe ed., Harvard University Press 1963).²¹ Legal economists and jurists, such as Judge Richard A. Posner, have expanded on Justice Holmes' theory, finding that at times it makes more economic sense for a party to break its promise (breach the contract) because "[t]he promisor [] discover[s] that his performance is worth more to someone else." *Patton v. Mid-Continent Sys., Inc.*, 841 F.2d 742, 750 (7th Cir. 1988). If this is the case, Judge Posner

²¹ Justice Holmes' theory is generally "interpreted to mean that a contracting party has a lawful option to perform or not." Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 Fordham L. Rev. 1085 (2000).

believes that “efficiency is promoted by allowing [the promisor] to break his promise,” *Id.*²² In such situations, the breaching party is nonetheless liable for the “value of the bargain” to the non-breaching party. *See* Modern Law of Contracts § 1:3. Opponents of “efficient breach” contend that allowing a party to breach a contract because it is no longer economically beneficial ignores “the sanctity of contract and the moral obligation to honor one’s promises.” *See* 2 A. CORBIN, CONTRACTS § 12.3 (2005). In addition, “efficient breach” ignores the transaction costs involved in negotiating the original contract. *See id.* But more importantly, “efficient breach” trivializes the process and deters people from entering into written contracts.

Judge Posner bases his acceptance of “efficient breach” contract theory on the premise that performance of the subject contract is somehow a losing deal or “uneconomic” for one of the parties. *See, e.g.,* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 2d § 4.9 (1977). UBMC cannot reach that threshold because there is no evidence that the Agreement was “uneconomic” or a “losing deal” for the hospital or the citizens of Roosevelt. There was no such evidence at the time that UBMC terminated the Agreement and there is no such evidence now. This is manifest by the fact that UBMC still uses Dr. Hardy’s services on occasion because Dr. Allred is no longer employed by UBMC. If the jury were to find that UBMC’s proffered reasons for termination of the Agreement (i.e., that the hospital would benefit from having an on-site

²² Judge Posner theorizes that in some situations compelling “completion of [a] contract would [] result in a waste of resources” which “the law does not compel [] but remits the victim to a simple damages remedy.” RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 2d § 4.9 (1977).

pathologist and additional help in the emergency room) rendered the Agreement “uneconomic” or a “losing deal” for UBMC, then at the very least, Dr. Hardy is entitled to damages for the “value” of his contract for UBMC’s purposeful, “efficient” breach of the Agreement.

Dr. Hardy committed to provide pathology services in the rural community of Roosevelt and negotiated a contract with UBMC that would allow him to do so. UBMC purposefully and knowingly breached the Agreement allegedly because hiring Dr. Allred was more beneficial to the hospital and the citizens of Roosevelt than honoring its written agreement with Dr. Hardy. Whether or not, in hindsight, UBMC’s breach was truly “efficient” is irrelevant since the theory of “efficient breach” requires the breaching party (UBMC) to compensate the non-breaching party (Dr. Hardy). UBMC’s breach was either “efficient” or it wasn’t. Regardless, pursuant to the theory of “efficient breach,” UBMC is liable to Dr. Hardy for its purposeful breach of the Agreement. Once again, since the Trial Court’s rulings have taken these issues away from the jury and deprived Dr. Hardy of his day in court, this Court should reverse the Trial Court and remand the case for a trial of these issues.

C. The Jury’s Role is to Determine the Objective Reasonableness of UBMC’s Decision to Terminate the Agreement.

In its decision in *Uintah Basin Medical Center v. Hardy*, the Utah Court of Appeals decided, on its own and without briefing on the issue, to analogize this matter to the employment context and set forth what an employer must show to prove that “it

terminated an employee for just cause.”²³ The Utah Court of Appeals “agree[d] with the majority of courts and adopt[ed] the objective reasonableness approach” requiring “an employer to justify termination with an objective good faith reason supported by facts reasonably believed to be true by the employer” at the time of termination. Ex. G at ¶¶ 22-23. This standard, however, does not take away from the jury’s fact-finding responsibilities; it simply changes them and requires the jury to “determine the objective reasonableness of the employer’s decision to discharge.” *Towson*, 862 A.2d at 950-51.

The Utah Court of Appeals’ decision relied primarily on two employment cases, *Towson* and *Cotran v. Rollins Hudig Hall Int’l, Inc.*, 948 P.2d 412 (Cal. 1998), both of which define “objective reasonableness” and carefully analyze a jury’s role in just cause employment cases. The *Towson* court held that “a jury’s role is to determine the *objective reasonableness* of the employer’s decision to discharge, which means that the employer act in objective good faith and base its decision on a *reasoned conclusion* and facts reasonably believed to be true by the employer.” *Towson*, 862 A.2d at 954 (emphasis added). *Cotran* goes one step further and holds that:

[t]he proper inquiry for the jury [] is not, “Did the employee *in fact* commit the act leading to dismissal?” It is “Was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after

²³ As noted above, while the Utah Court of Appeals analogized this matter to the employment context, this matter is a contract issue between UBMC and an independent contractor. Unlike the general at will employment legal framework, this dispute focuses on what the “just cause” provision means in this particular agreement. The Utah Court of Appeals has now defined the just cause provision in this Agreement and the issue should be sent to a jury. While Dr. Hardy disagrees with the Utah Court of Appeals’ legal framework, even if not viewed as a contract issue, this Court should remand the just cause issue for a jury decision.

an appropriate investigation and for reasons that are not arbitrary and pretextual?”

Id. at 421-22. *Cotran* provides further guidance by defining “good cause” as:

fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.

Id. at 422. A jury, therefore, judges the employer’s objective reasonableness for termination on whether there was investigation, reasoned conclusions, and “notice of the claimed misconduct” when contradictory evidence is presented. Moreover, the inquiry focuses on what the terminating party believed at the time it terminated the relationship and not reasons created at a later date.

If given the opportunity contemplated by the Utah Court of Appeals, Dr. Hardy could present to the jury his facts to show that UBMC’s purported reasons for terminating the Agreement are not legitimate. Contrary to UBMC’s assertions that Dr. Hardy has no evidence, Dr. Hardy can prove (or at a minimum raise a question of fact) that UBMC acted in bad faith when it terminated the Agreement. Dr. Hardy can show that UBMC conducted no investigation either into Dr. Allred’s qualifications or into whether or not UBMC even needed an on-site pathologist.²⁴ Additionally, there is no analysis of the economic benefits associated with Dr. Hardy’s services or the anticipated economic benefit of hiring Dr. Allred. Dr. Hardy can also show that UBMC did not terminate the

²⁴ See LeBaron depo. (Ex. N) at pp. 39-40.

Agreement for poor performance, misconduct, a breach of the Agreement, or failure to fulfill his obligations, and, in fact, UBMC thanked him for his service. Indeed, many of UBMC's witnesses testified in their depositions that Dr. Hardy was well-respected and liked by the doctors and staff at the hospital, which is borne out by the fact that UBMC still, even to this day, asks Dr. Hardy to help out and work at the hospital.²⁵ Dr. Hardy will testify that he was not given a reason for the termination at the time the Agreement was terminated, except for the fact that UBMC decided to hire Dr. Allred. Finally, Dr. Hardy can show that he was not given a chance to respond to the termination, meaning that Dr. Hardy was not offered the chance to cure or even address any alleged need for an on-site pathologist. While UBMC is sure to dispute this evidence, the critical point is that it is the jury's province, not a judge's, to weigh the credibility of the witnesses and evidence, and to determine whether it believes UBMC's or Dr. Hardy's version of the facts.

UBMC mistakenly draws the conclusion from the appellate court's decision that the Trial Court makes every determination regarding just cause. The standard derived from the case law relied on by the Utah Court of Appeals clearly does not cut the jury out of its fact-finding role. Contrary to UBMC's contention that the Utah Court of Appeals "anticipated the trial court's ruling," the Utah Court of Appeals reversed the Trial Court's order granting UBMC's motion for summary judgment, remanding the case to the Trial Court for proceedings "consistent" with its opinion. *See* Ex. G. Proceedings "consistent" with the Utah Court of Appeals' decision include sending the just cause issue to a jury. If

²⁵ *See id.* at pp. 34 & 81-82.

the Court of Appeals truly believed that Dr. Hardy did not have sufficient evidence, and that there was not an issue of fact, it would have simply affirmed the Trial Court's ruling, which it could do on any viable basis. It did not do that because it realized that Dr. Hardy did not yet have the opportunity to present all of his evidence regarding just cause. It thus remanded the case. Having the Trial Court, rather than a jury, make credibility determinations and rule on the reasonableness of UBMC's termination is simply not "consistent" with the Utah Court of Appeals' order.

Dr. Hardy believes that he has presented sufficient issues of fact suggesting that UBMC's decision to terminate the Agreement was pretextual, especially considering the fact that the justifications and explanations offered by UBMC are all post hoc after-the-fact justifications for the termination.²⁶ Moreover, such reasons do not show what facts UBMC believed to be true at the time of termination as required under the cases cited by the Utah Court of Appeals. Certainly, Dr. Hardy should be given the chance to argue to a jury that such facts were created after the fact and are mere pretext. Dr. Hardy has not completed discovery, nor has he presented all of his factual evidence on the issue of just cause. The Utah Court of Appeals contemplated that Dr. Hardy would be given such an opportunity and the Trial Court denied that to Dr. Hardy.

²⁶ Brad LeBaron admitted at his deposition that he would find a way to justify UBMC's actions and decision to terminate the Agreement with Dr. Hardy after the fact, that he would find just cause by "look[ing] and see[ing] what other kinds of potential issues might be brought up." See Ex. N at p. 126.

Taking the decision about whether UBMC's termination was objectively reasonable away from the jury demonstrates clear error on the part of the Trial Court. As such, this Court should remand this case to the Trial Court for trial.

D. The Jury's Role is to Determine Whether UBMC's Proffered Reason for Termination of the Agreement was Pretextual.

The Utah Court of Appeals essentially determined that the just cause provision in the Agreement required treatment similar to the burden shifting analysis in typical employment discrimination cases. In the traditional "burden shifting" analysis for wrongful termination, once an employer proffers a legitimate business reason for the employee's discharge, the employee must raise a question of fact as to whether the proffered reason is pretextual in order to proceed to trial. *See McDonnell Douglas*, 411 U.S. at 802-805. If a question of fact is presented, then the finder of fact (a jury in this case) determines whether the employer's proffered reason for discharge of the employee was in fact pretextual. Pretext is shown by "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action . . ." such that a "reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted [] reasons.'" *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997) (citation omitted). Said another way, "pretext is defined as (1) 'An ostensible or professed purpose; an excuse' and (2) 'An effort or strategy intended to conceal something.'"²⁷

²⁷ *Miller v. EBY Realty Group LLC*, 396 F.3d 1105, 1111 (10th Cir. 2005) (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000)). In

Regarding evidence of pretext, the Tenth Circuit Court of Appeals, in *Miller v. EBY Realty Group LLC*, allowed the terminated employee to produce evidence showing that the explanation his employer gave him on the day he was terminated was false. See *Miller*, 396 F.3d at 1115. The court stated “[w]e have previously held that a pretext instruction ‘is required where, as here, a rational finder of fact could reasonably find the [employer’s] explanation false and could infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.’” *Id.* (citing *Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002) (citation omitted) (emphasis added)). In essence, “[t]he relevant inquiry is not whether [the defendant’s] proffered reasons were wise, fair or correct, but whether [it] honestly believed those reasons and acted in good faith upon those beliefs.” *Exum v. United States Olympic Comm.*, 389 F.3d 1130, 1138 (10th Cir. 2004) (citation omitted). In other words, Dr. Hardy “must point to evidence suggesting that [UBMC] itself did not honestly believe” the explanation it gave to him for termination of the Agreement to be true at the time it was terminated. *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 411 (7th Cir. 1997). Significantly, Dr. Hardy was not given a reason for termination of the Agreement at the time that UBMC terminated it. See Ex. M. He was simply thanked for his service and told that he had been replaced.

The important language taken from the *Miller* case above is “rational finder of fact,” which in this case is a jury. A jury of Dr. Hardy’s peers could easily find UBMC’s

Miller, the court held that “[p]retext exists when an employer does not honestly represent its reasons for terminating an employee.”

post-hoc justifications to be false and pretextual because there is no evidence that any of the reasons now given were actually held by UBMC at the time it terminated the Agreement, or were even considered prior to the termination. UBMC conducted no business analysis regarding the need for a full-time, on-site pathologist or how, if at all, having one would benefit the hospital and its patients.²⁸ UBMC failed to provide Dr. Hardy or anyone reviewing the circumstances of termination, reasons that would justify terminating the Agreement. UBMC is a sophisticated provider of medical services, and it is not unreasonable to expect UBMC to substantiate its decision with the facts or credible reasons. Besides being unreasonable, investigation and reasoned conclusions are required as set forth in *Cotran*. Certainly a jury could find that UBMC's post-hoc justifications are weak, implausible, and inconsistent.

Once again, the critical issue is that while UBMC and Dr. Hardy will dispute the evidence and UBMC's proffered reasons for termination, the Trial Court's summary dismissal has deprived the jury of its role to weigh the credibility of the evidence and make its choice as to which version of the facts it believes. This is clearly a jury question and Dr. Hardy has been denied his right to have the jury decide the issue. Moreover, based on this disputed evidence, the Trial Court was required to draw all inferences in favor of Dr. Hardy which it clearly did not do. These actions by the Trial Court constitute reversible error.

²⁸ See Ex. N at pp. 40-41.

E. UBMC's Proffered Reasons for Termination of the Agreement are Pretextual and Illusory, Proving UBMC's Caprice and Bad Faith.

At best, the reasons that might be conjured up by UBMC for termination of the Agreement are illusory: UBMC might like to have a full time pathologist, but there is no evidence of any need. Or, UBMC might like to have extra help in the emergency room, but there is no evidence of any need, and even if there was a need, Dr. John Masaryk, a former ER doctor at UBMC, had expressed an interest in returning.²⁹

UBMC's failure to investigate the hospital's pathology and emergency room needs evidences that UBMC's termination of the Agreement was pretextual and that the perceived need was not real at the time, but created after-the-fact.³⁰ Further, UBMC's failure to articulate any "reasoned conclusions" or to investigate as required by *Towson* and *Cotran* is evidence of pretext.³¹ Finally, the deposition testimony and meeting

²⁹ See UBMC Medical Staff Meeting minutes dated July 11, 1996, included in the Addendum as Exhibit "S."

³⁰ Brad LeBaron, the Chief Administrator of UBMC, admitted in his deposition that there was no analysis made of the business reasons for hiring a full-time pathologist. Where are the records of UBMC considering the number of pathology procedures performed by Dr. Hardy and an estimate of the pathology procedures that could be performed by a full-time pathologist? Where are the notes of any conversations with the staff physicians concerning their pathology needs—whether those needs were being met by Dr. Hardy or not? There is simply no evidence that UBMC had a good reason for hiring Dr. Allred because he was going to be a full-time pathologist. Dr. Hardy's expert, Dr. Elizabeth Hammond, will testify at trial that UBMC did not conduct a sufficient investigation of the hospital's needs for a full-time pathologist. See Ex. N at pp. 40-41.

³¹ UBMC failed to conduct any comprehensive investigation regarding Dr. Hardy's replacement, Dr. Allred. Most egregiously, UBMC never contacted the National Practitioner Databank to inquire whether Dr. Allred had any malpractice claims pending against him. If it had done so, it would have discovered that Dr. Allred was in the process of being sanctioned by the State of Florida Board of Medicine at the time he was hired by UBMC. See *id.* at pp. 114-115.

minutes clearly show that the medical staff did not approve of terminating the Agreement, did not recommend that the hospital hire Dr. Allred, and that there had been no complaints about Dr. Hardy's service or performance of pathology services at UBMC. *See* Ex. S and UBMC Board of Trustees meeting minutes dated July 18, 1996, included in the Addendum as Exhibit "T."³²

Certainly these facts cast doubt on the purported reasons for termination proffered by UBMC and raise the necessary questions of fact to survive summary judgment, especially since the Trial Court was required to draw all inferences in favor of Dr. Hardy. Though Dr. Hardy believes that there are no just cause reasons for termination of the Agreement, he realizes that the objective reasonableness of UBMC's proffered reasons for termination is a jury question under the Utah Court of Appeals' analysis. Indeed, the following are jury questions relevant to that determination: (1) Was UBMC's decision to replace Dr. Hardy with Dr. Allred (even though UBMC admits that Dr. Allred would cost the hospital more money) an objectively reasonable decision?;³³ (2) Was it objectively reasonable for UBMC to hire a pathologist without talking with other pathologists who worked with him at his previous hospital?; (3) Was it objectively reasonable for UBMC to hire a full-time on-site pathologist without determining whether there was a real need for one?; (4) Was it objectively reasonable for UBMC to hire Dr. Allred without negotiating a contract with him?; and (5) In light of Dr. Hardy's evidence, did UBMC

³² *See also* Ex. N at p. 46.

³³ UBMC paid for Dr. Allred to relocate from Florida and also paid Dr. Allred a much higher salary than fees paid under the Agreement with Dr. Hardy. *See id.* at pp. 77-79.

make a reasoned business decision? These are all relevant questions that the finder of fact, a jury in this case, should answer, not the Trial Court. Consequently, the Trial Court has erred in taking away from the jury its role of deciding whether UBMC was objectively reasonable in its decision to terminate the Agreement.

II. THE TRIAL COURT ERRED WHEN IT ORDERED THE PARTIES TO FILE BRIEFS ON THE “REMAINING ISSUE” AND THEN TREATED THOSE BRIEFS AS A MOTION FOR SUMMARY JUDGMENT.

On March 22, 2005 the Trial Court, without jurisdiction over the case, directed the parties to simultaneously file “a brief on the remaining issue.” *See* Ex. H. At that time, the Trial Court did not have jurisdiction of this case as it had not been remanded to the Trial Court. The Utah Court of Appeals set the date of May 3, 2005 as the date upon which the remittitur would occur pursuant to Rules 36 and 48 of the Utah Rules of Appellate Procedure. (R. 1983). Until such time as the case is remanded to the Trial Court, the Utah Court of Appeals retained jurisdiction over the case.³⁴

In response to the Trial Court’s order, Dr. Hardy briefed the “just cause” issue, providing an outline of how the issue should be treated procedurally, and providing a sketch of the factual issues Dr. Hardy would present at trial. *See* Ex. I. Dr. Hardy also reminded the Trial Court and UBMC that both had previously stated that just cause is a question of fact for the jury. Indeed, the Trial Court previously held that “[w]hether Plaintiff had ‘just cause’ to terminate the contract would be a question for the jury.” *See* Ex. C. This argument is consistent with the Utah Court of Appeals’ decision and reliance

³⁴ *See e.g., Hi-Country Estates Homeowners Ass’n v. Foothills Water Co.*, 942 P.2d 305, 305-06 (Utah 1996) (the “trial court is divested of jurisdiction over a case while it is under advisement on appeal.”)

on *Towson* and *Cotran*. In his brief, Dr. Hardy also asked the Trial Court to allow additional discovery, specifically of Dr. Stewart whose deposition was never completed because of UBMC's objections and instruction to him not to answer several questions at his deposition. Additionally, Dr. Hardy asked the Trial Court to set this case for trial since both parties, the Trial Court, and the Utah Court of Appeals believed the just cause issue to be one of fact for the jury's determination.

Instead of complying with the Trial Court's order to brief the "remaining issue," UBMC filed a motion for summary judgment. *See* Ex. J. This was not in keeping with the Trial Court's order because the parties were not asked to make simultaneous motions for summary judgment, but to brief the "remaining issue." Moreover, UBMC's Motion for Summary Judgment was improper because the dispositive motion deadline had passed years earlier, and UBMC did not seek leave of court to file a dispositive motion beyond the deadline. Dr. Hardy did not respond to UBMC's Motion for Summary Judgment because he had no indication that the Trial Court would treat the briefs on the "remaining issue" as a motion for summary judgment.³⁵ Indeed, the hearing notice (included in the Addendum as Exhibit "U") was titled "Notice of Hearing on Remaining Issue," not "Notice of Hearing on UBMC's Motion for Summary Judgment." In addition, UBMC never submitted a "Notice to Submit for Decision" as required in Rule 7(d) of the Utah Rules of Civil Procedure. Dr. Hardy had no reason, therefore, to believe that the briefs would be treated as a motion for summary judgment. To the contrary, Dr. Hardy

³⁵ At the very least, once the Trial Court decided that it was going to treat the briefs on the "remaining issue" as a motion for summary judgment, it should have given Dr. Hardy notice and a chance to respond to UBMC's briefing.

reasonably believed that the hearing on the “remaining issue” was a pretrial hearing where a trial date would be set because both UBMC and the Trial Court had previously stated that “just cause” is an issue of fact for the jury. *See* Exhibits C and L. The Trial Court’s treatment of the briefs as a motion for summary judgment, together with the abrupt reversal of its prior treatment of “just cause” as an issue of fact, is further evidence that the Trial Court has no interest in allowing this case to go to trial.

To the extent that the Trial Court treated the briefs on the “remaining issue” as a motion for summary judgment, the Trial Court did not adhere to the summary judgment standard because it did not construe all facts presented and inferences arising from those facts in the light most favorable to Dr. Hardy as the nonmoving party. *See Morris v. Farnsworth Motel*, 259 P.2d 297 (Utah 1953) (setting forth the standard for summary judgment). The Trial Court may disagree with the facts presented by Dr. Hardy, but it cannot and should not weigh the evidence at the summary judgment stage.³⁶

The Trial Court completely ignored all of the evidence of pretext discussed above. The Trial Court also ignored the deposition testimony presented by Dr. Hardy which shows that there are genuine factual disputes, i.e. regarding the hiring practices for doctors (testimony of Dr. Elizabeth Hammond regarding the hiring procedures for hiring a pathologist—*See* Deposition of Elizabeth Hammond, M.D., relevant cited portions of

³⁶ *See Draper City v. Bernardo*, 888 P.2d 1097, 1100 (Utah 1995) where this Court held that “[o]n a motion for summary judgment, a trial court should not weigh disputed evidence, and its sole inquiry should be whether material issues of fact exist.”

which are included in the Addendum as Exhibit “V”),³⁷ and disputes as to whether or not there was any discussion regarding the need for an on-site pathologist (testimony from Dr. Stewart that he never discussed with anyone at UBMC the hospital’s need for an on-site pathologist until Dr. Allred began inquiring about the pathology position at UBMC). *See* Deposition of Wayne Stewart, M.D., relevant portions of which are included in the Addendum as Exhibit “W.” These asserted and supported facts controvert the evidence relied on by UBMC and create genuine issues of material fact precluding the entry of summary judgment.³⁸ Furthermore, these issues alone are sufficient to try this case to a jury, and, therefore, the Trial Court erred in granting UBMC’s Motion for Summary Judgment.

III. WHETHER OR NOT UBMC BREACHED THE COVENANT OF GOOD FAITH AND FAIR DEALING INHERENT IN EVERY CONTRACT, INCLUDING THE AGREEMENT HERE, IS A QUESTION OF FACT FOR THE JURY.

As a result of the Trial Court’s dismissal of Dr. Hardy’s counterclaim, he has been deprived of his right to have a jury determine whether or not UBMC breached the implied covenant of good faith and fair dealing when it terminated the Agreement. This

³⁷ It is important to note that Dr. Hammond was designated as Dr. Hardy’s expert before Rule 26 of the Utah Rules of Civil Procedure was amended in November 1999. She has not, therefore, submitted an expert report, although UBMC did depose her in September 1999. Dr. Hardy intends to submit an expert report for Dr. Hammond containing a full exposition of the subject matter on which she will testify in compliance with Utah R. Civ. Pro. 26(a)(3)(B).

³⁸ UBMC argued previously in this case that “a genuine issue of material fact exists with regard to the issue of just cause.” *See* Ex. L at p. 8. UBMC now wishes to reverse its course and argue that there are no issues of material fact. The facts have not changed and there are still issues of material fact. Summary judgment, therefore, is improper.

claim cannot be ignored as it was plead at the outset and the covenant of good faith and fair dealing is inherent in every contractual relationship. While this is an alternative claim to Dr. Hardy's contract claim, it is part and parcel of the "remaining issue" of whether or not UBMC had just cause to terminate the Agreement.

Dr. Hardy had a contract with UBMC, and, therefore, both parties **had** a duty to act in good faith. Dr. Hardy has presented sufficient evidence that UBMC breached this covenant by proffering pretextual, illusory reasons for termination of the Agreement. Utah case law supports Dr. Hardy's contention that bad faith termination of a contract is a breach of the implied covenant of good faith and fair dealing.³⁹ At trial Dr. Hardy will show that UBMC had a duty to act in good faith when it terminated the Agreement under the just cause provision and that it failed to do so.⁴⁰ Bad faith and reasonableness are clearly jury questions and Dr. Hardy has been deprived of his right to have a jury weigh his evidence of UBMC's bad faith. In other words, Dr. Hardy is entitled to have the jury **hear** the evidence and then determine whether the facts support recovery under a contract theory, a just cause termination theory as outlined by the Utah Court of Appeals, or under a covenant theory.

³⁹ There are many ways that "a contracting party can exercise a retained contractual power in bad faith," including in its determination to terminate a contract. *Olympus Hills Shopping Ctr., Ltd.*, 889 P.2d at 451 (citing *Resource Mgmt. Co. v. Weston Ranch & Livestock Co., Inc.*, 706 P.2d 1028, 1037 (Utah 1985)).

⁴⁰ Mr. LeBaron testified that in a conversation with Dr. Hardy shortly after termination of the Agreement, regarding this lawsuit, he told Dr. Hardy that the hospital would find just cause in order to justify UBMC's termination of the Agreement. Mr. LeBaron admitted that he would justify UBMC's actions after- the-fact. See Ex. N at p. 126.

CONCLUSION

The Trial Court erred when it usurped the jury's role in determining whether or not UBMC's decision to terminate the Agreement was objectively reasonable. This is a contract case, not an employment case, and, therefore, Dr. Hardy is entitled to have a jury determine the reasonableness of UBMC's termination of the Agreement. Likewise, it is the jury's role to determine whether UBMC's proffered reason for termination of the Agreement was pretextual.

The Trial Court also erred when it treated the just cause arguments and briefs on the "remaining issue" as a motion for summary judgment. To the extent, however, that the Trial Court treated the briefs on the "remaining issue" as a motion for summary judgment, the Trial Court did not adhere to the summary judgment standard because it did not construe all facts presented and inferences arising from those facts in a light most favorable to Dr. Hardy.

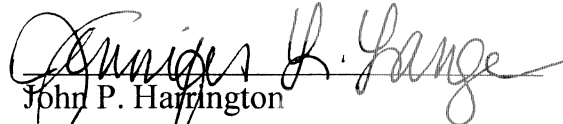
Finally, the Trial Court erred in granting UBMC's motion for summary judgment because whether or not UBMC breached the covenant of good faith and fair dealing inherent in every contract is a question of fact for the jury.

Accordingly, this Court should enter an order reversing the Trial Court's ruling granting summary judgment in favor of UBMC, and remand this case to the Trial Court

for a jury trial. This case has seen its journeys and after almost 10 years, it is time to allow a jury to decide the matter after both sides fully and fairly present their evidence.

DATED this 20th day of June 2006.

HOLLAND & HART LLP

A handwritten signature in cursive script, appearing to read "Jennifer L. Lange", written in dark ink over a horizontal line.

John P. Harrington

Jennifer L. Lange

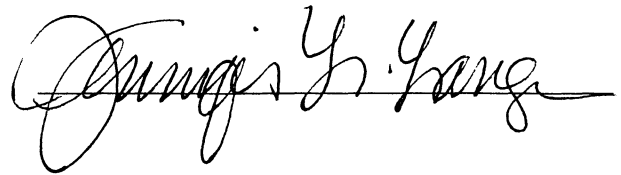
Attorneys for Defendant/Appellant

Leo W. Hardy, M.D.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF APPELLANT, LEO W. HARDY** was sent via U.S. first class mail, postage prepaid this 20th day of June, 2006 to the following:

Blaine J. Benard
E. Blaine Rawson
Holme, Roberts & Owen, LLP
299 South Main, Suite 1800
Salt Lake City, Utah, 84111

A handwritten signature in black ink, appearing to read "Jung H. Yang", written in a cursive style.

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